# No. 12,275

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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P. W. CARLSTROM and MRS. GEORGE (RETA) TAITT, individually and as co-partners, doing business under the firm name and style of Associated Packing Co.,

*Appellants,*

vs.

AGRICULTURAL INSURANCE COMPANY, a corporation; FEDERAL UNION INSURANCE COMPANY, a corporation; GLOBE AND RUTGERS FIRE INSURANCE COMPANY, a corporation; THE HOMESTEAD FIRE INSURANCE COMPANY, a corporation; NEW HAMPSHIRE FIRE INSURANCE COMPANY, a corporation, et al.,

*Appellees.*

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## APPELLANTS' OPENING BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

## Subject Index

## Table of Authorities Cited

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### STATEMENT OF JURISDICTION.

The cause of action involved herein was originally filed in the Superior Court of the State of California,

in and for the City and County of San Francisco. Appellees caused the removal thereof to the United States District Court on the ground of diversity of citizenship, pursuant to Title 28, Section 1332 of the United States Code.

The amount in controversy exceeds the sum of $3,000.

The trial of the action before the Federal District Court resulted in a judgment for appellants against each appellee insurance company in the amount of $6,230.70, totalling $31,153.52.

In said judgment, the Federal District Court ordered, adjudged and decreed

> "* * * that the plaintiffs are not entitled to interest from the defendant insurance companies on each said amount adjudged and decreed to be due plaintiffs, and that plaintiffs take nothing as and for interest on said amounts."

This appeal is from that portion of the judgment only, denying interest to appellants on the amount found due and for which judgment was rendered, and is prosecuted to this Court pursuant to the provisions of Title 28, Sections 1291 and 1294, United States Code, and in conformance to Rule 76, Federal Rules of Civil Procedure. The agreed statement, findings of fact and conclusions of law and the judgment constitute the record on appeal. (Record, pp. 2-26, 29-39, 40-42.)

## STATEMENT OF THE CASE.

The contracts of fire insurance (Standard Form fire insurance policy, prescribed by section 2071 of the Insurance Code of California) covering the loss involved herein, provide for the manner of ascertainment of the amount of loss; that such loss "shall be payable in thirty days after the amount thereof has been ascertained either by agreement or by appraisement; *but if such ascertainment is not had or made within sixty days after the receipt by the company of the preliminary proof of loss, then the loss shall be payable in ninety days after such receipt.*" (Lines 139 and 140.) (Italics for emphasis.)

Section 3287 of the California Civil Code, to the effect that a "person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, *is entitled also to recover interest thereon from that day,* * * *" (Italics for emphasis) has been construed and applied by the Supreme Court of California in respect to the provisions of the California Standard form fire insurance policy as authorizing the recovery of interest from the date the loss was due and payable. That decision is

*Koyer v. Detroit Fire & Marine Ins. Co.,* 9 Cal. (2d) 336, 70 Pac. (2d) 927.

Section 1652, Title 28, United States Code, provides that the laws of the several States, with certain exceptions (not applicable hereto) shall be regarded as rules of decisions in civil actions in courts of the United States, in cases where they apply.

## SPECIFICATION OF ERROR.

In refusing to allow interest on the amount of loss from the date such loss was due and payable, the Federal District Court erred by failing to conform to the decision of the Supreme Court of California, the Supreme Court of the United States

(*Concordia Ins. Co. of Milwaukee v. School Dist. No. 98,* 51 S. Ct. 275; 282 U.S. 545; 75 L. Ed. 528)

and to the provisions of said Section 1652, Title 28 of the United States Code.

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## ARGUMENT.

### (a) LOSS CAPABLE OF DETERMINATION BY CALCULATION.

The agreed statement shows that appellants and appellee insurance companies disagreed as to the amount of loss claimed; that shortly after proofs of loss were filed with the insurance companies, they admitted appellants' loss in the total amount of $14,320.00. (Record p. 8.)

Insurance against loss by fire in the total amount of $87,500.00, under said policies, was issued to appellants, and such insurance was in full force and effect at the time of the fire (October 6, 1945) which destroyed ninety-nine (99%) per cent of the lumber and material insured. (Record pp. 3, 37.)

The findings of fact and agreed statement clearly establish that appellants performed all conditions and complied with all provisions of said policies. (Finding X (12), Agreed Statement, Record pp. 6-7 and 35.)

One such condition of the policies reads:

> "If the insured and this company fail to agree, in whole or in part, as to the amount of loss within ten days after such notification, this company shall forthwith demand in writing an appraisement of the loss or part of loss as to which there is a disagreement and shall name a competent and disinterested appraiser, and the insured within five days after receipt of such demand and name, shall appoint a competent and disinterested appraiser and notify the company thereof in writing, and the two so chosen shall before commencing the appraisement, select a competent and disinterested umpire." (Lines 115-119, Agreed Statement, Record p. 5.)

Failure on the part of appellants to meet any demand for appraisement would have constituted a bar to bringing suit on the policies.

> *Winchester v. North British and Merc. Ins. Co.,* 160 Cal. 1, 116 Pac. 63;
>
> *Insurance Policy Annotations,* Vol. 1, Part Two, pp. 293, et seq. and 1945 Supp. thereto, published by Section of Insurance Law, American Bar Association.

The fact that suit was instituted on the policies without a plea in bar thereto for such failure of appellants to meet the demand of appellees, insurance companies, for an appraisement evidences one of two things, to-wit: That no demand for appraisement was made, not made timely, or it was waived by appellees, insurance companies. Through no fault of appellants, an appraisement was not undertaken or had.

The decision of the Supreme Court of California in the *Koyer* case, supra, construing and applying section 3287 of the Civil Code of California to the provisions of the Standard Form California Fire Insurance Policy, is soundly based upon the terms and conditions of the policy *as constituting an agreement* "upon the use of that method in fixing the amount of the insurers' liability" by which the insured and the insurer bound themselves to determine the amount of loss. It was clearly decided in that case that appellant insurance company there could not "consistently ask the Court to declare the method they have adopted as an important element of their contract to be inadequate and uncertain and insist that trial of the issue in Court is necessary for a correct and just determination." (9 Cal. (2d) p. 346.) In support of the statement that the "loss was capable of being made certain by calculation" and that therefore interest was allowable "from the date the right of recovery is vested", the Court said (p. 345):

> "* * * It would seem to admit of no doubt that an ordinary fire or earthquake loss is adjusted by calculation, whether it be a total or a partial loss. Preliminary proofs of loss are calculations of the loss, as are also the estimates of appraisers, and *these are the methods of adjustment contemplated by the parties and stipulated in the policies.* Resort may be had to court action only in the event the calculations of the parties or those of their appraisers are not in agreement. * * *" (Italics for emphasis.)

(b) PRIOR DECISION OF THIS COURT NOT NOW CONTROLLING.

Under the decision of

*National Union Fire Ins. Co. v. Calif. Cotton Credit Corp.,* 76 Fed. (2d) 279

in February, 1935, approximately *two years prior* to the decision of the Supreme Court of California in the *Koyer* case, supra, it was stated (p. 290):

> "No case decided by the Supreme Court of California has been called to our attention, and we have found none that is controlling in the situation presented in the case at bar. * * *"

At the time that decision was handed down the latest expression of the Supreme Court of California on the subject of allowance of interest was that contained in

*Anselmo v. Sebastiani,* 219 Cal. 292, 26 Pac. (2d) 1.

The following cases were also cited and referred to by this Court:

*Gray v. Bekins,* 186 Cal. 389, 199 P. 767;
*Perry v. Magneson,* 207 Cal. 617, 279 P. 650;
*Mabrey v. McCormick,* 205 Cal. 667, 272 P. 289.

None of the foregoing cases cited *involved a loss under the Standard Form Fire Insurance Policy of California.*

This Court, referring to the case of *Anselmo v. Sebastiani, supra,* stated (p. 290):

> "The court in that case *tends* to the view that whether the damages are liquidated or unliquidated is not determinative of the question of interest." (Italics for emphasis.)

It was further therein stated (p. 290):

> "In *Gray v. Bekins,* 186 Cal. 389, 399; 199 P. 767, in an action for recovery on the basis of quantum meruit, the court allowed interest from the date the answer was filed because *the answer was construed to be an acknowledgement of the plaintiff's claim to the extent therein admitted and subsequently found due by the trial court.* In that case the court stated the test to be applied was whether or not the exact amount found due was known and admitted by defendant to be due plaintiff. * * *" (Italics for emphasis.)

And referring to *Mabrey v. McCormick,* supra, this Court therein said (p. 290):

> "The court, however, decided that it was by reason of the action of plaintiffs *that the amount due was unliquidated* until determined by judgment of the court so that interest prior to judgment, as damages, was not allowable." (Italics for emphasis.)

All the foregoing cases referred to and cited by this Court have been definitely modified by the decision of the Supreme Court of California in the *Koyer* case, supra, and the *Koyer* case being the last pronouncement upon the question is controlling upon the Federal Courts of this jurisdiction.

In further support of appellants' contention herein, the case of

> *Jacobs v. Farmers Mutual Fire Ins. Co.,* 5 C.A. (2d) 1, 41 P. (2d) 960,

decided by the District Court of Appeal, Third District of California *just one day after the decision of this Court in National Union Fire, etc. v. Calif. Cotton Credit Corp., supra,* is cited in support of appellants' contention. In that case it was held that (pp. 11 and 12):

> "(9) When the evidence shows a total loss of the property insured, and a compliance with all of the terms of the policy on the part of an insured person, except such as have been waived by the insurance company, interest is properly included on the amount of the obligation due under the terms of the policy, from the date when the loss is payable. The mere unwarranted denial of the validity of the contract on the part of the insurance company will not have the effect of defeating the right to recover interest otherwise recoverable under the provisions of section 3287 of the Civil Code. (26 *C.J.* p. 575, sec. 795; *Rogers v. Manhattan Life Ins. Co. of N.Y.,* 138 Cal. 285, 71 Pac. 348)."

The loss involved in the case at bar was *ninety-nine* (99%) *per cent total.* (See Agreed Statement, Record p. 37.)

A further reason *National Union Fire, etc. v. Calif. Cotton Credit Corp.,* supra, cited and relied upon by the Federal District Court in the memorandum opinion denying the allowance of interest to appellants, is not applicable or now controlling in the case at bar appears from the decision of this Court—that the loss there involved was under policies of *market and crop*

*insurance.* While true such policies contained the same standard provisions, the calculations of loss were of much greater complication and difficulty. But the answer to the contention of *indefinite* determination of the amount of loss is given by the Supreme Court of California in the *Koyer* case, supra, as follows (pp. 345 and 346):

> "Under the terms of the policies the loss was payable ninety days after receipt of preliminary proofs of loss by the companies. * * * Although defendants *disputed the amount of the loss,* they did not deny liability. * * * If, therefore, the amount of plaintiff's loss was capable of being made certain *by calculation,* interest was allowable from July 12, 1933, when the loss became payable. * * * In each case total destruction of the building was taken as the basis of the loss. * * * By the terms of the policies the actual value could not exceed the amount which it would cost the insured to repair or replace the property * * *. There was available to the parties *before suit* all of the knowledge and all of the means of knowledge of the extent of the loss which was available to them *or to the court or jury* upon a trial of the question of loss. * * * The principal complaint of the defendants here is that the matter has been taken to court and while contending that calculation and appraisement furnish an uncertain means of fixing the insurers' liability, *they also complain bitterly of the conclusions reached by the jury.* In support of our conclusion that the loss in question was capable of being made certain by calculation, we refer to the following authorities: * * *" (Italics for emphasis.)

Appellants here also complain bitterly of the conclusion reached by the Federal District Court *in fixing the amount of their loss.* Proof was offered of valuations of the lumber and material destroyed by fire far in excess of the amount determined by the Court. Valuations ranging from $110,000 to $220,000 were testified to by witnesses on behalf of appellants. An offer of proof was made that the Government (from whom it was purchased) had appraised the lumber and material shortly before it was sold to appellants (as evidenced by official documents of the War Assets Administration—Exhibit 29 for Identification) at $55 per thousand board feet, or a total of $262,607.40! One witness, G. R. Tully, called in the closing days of the "piece-meal" and long delayed trials of the case, was permitted to qualify as an expert on values of lumber "that he had been in the wholesale lumber business for 30 years, sales manager for seven years, and was a qualified inspector of lumber for 40 years, buying and selling lumber" but was not permitted to testify to a valuation of the lumber other than the lumber "slats". An offer of proof was made, however, that he would testify that all the lumber and material had a market value, at the time of the fire, of $25 per thousand board feet. (Agreed Statement, Record pp. 14-15.) Such valuation produced a total, by calculation based upon the Government Invoice, of $111,760.10, or $99,260.10 based upon the determination of the quantity made by the Federal District Court.

Appellants are constrained to state that the unjustifiably long agreed statement, reached pursuant to Rule 76 of the Federal Rules of Civil Procedure as the basic record on appeal, in lieu of the rather voluminous and cumbersome record which otherwise would have been necessarily prepared at great cost, does not and cannot support the conclusion of the Federal District Court that

> "The factual background does not permit or justify the application of *Koyer v. Detroit F. & M. Ins. Co.,* 9 Cal. (2d) 336, upon which plaintiff relies. * * *
>
> Suffice to say that it remained for this Court to ascertain the amount of liability from the evidence introduced at the trial." (Agreed Statement, Record p. 19.)

It is rather obvious that the Federal District Court seized upon the statement (purely dicta) in the *Koyer* case, p. 345, that

> "The amount awarded plaintiff by the jury conformed closely to the amount claimed in the proofs of loss."

as the basis for the "factual background."

That such was not the premise or predicate for the Court's decision in the *Koyer* case has been demonstrated by quotations from the case hereinbefore set forth.

### (c) THE GENERAL RULE SUPPORTS APPELLANTS' CONTENTION.

The subject of "Interest" is discussed in

46 *C.J.S.*, sec. 1393, p. 696

and the general rule therein stated is as follows:

> "As a general rule interest on the amount payable under a fire insurance policy may be allowed if the insurer has wrongfully withheld payment when due."

Cited in a footnote (5) is the case of

*Hargett v. Gulf Ins. Co.*, 12 C.A. (2d) 449 (1936), 55 Pac. (2d) 1258.

At page 458, the Court said:

> "Plaintiff had a right to receive interest upon any amounts to which he may have been entitled under the policies, *as compensation allowed by law* for the detention of money. (*Civ. Code*, sec. 3287; *Coulter v. Howard*, 113 Cal. App. 208 (298 Pac. 140); *Pacific Coast Adjustment Bureau v. Indemnity Ins. Co.*, 115 Cal. App. 583 (2 Pac. (2d) 218); *Jacobs v. Farmers Mutual Fire Ins. Co.*, 5 Cal. App. (2d) 1 (41 Pac. (2d) 960) * * *" (Italics for emphasis.)

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### CONCLUSION.

It is respectfully submitted that the trial Court erred in refusing to allow interest on the amount awarded appellants, from the date (March 6, 1946) due, in accordance with the terms and conditions of the policies of insurance, and that the judgment in

respect to such disallowance of interest should be reversed.

Dated, San Francisco, California,
July 28, 1949.

Respectfully submitted,
NEIL CUNNINGHAM,
*Attorney for Appellants.*